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INDEX

CITATIONS

63079—38

Statute:

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 957

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B–825; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B–839; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B–832; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B–826; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B–828; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B–829; AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B–830, THE SAID INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND EACH AND ALL OF ITS SAID LOCAL UNIONS AFORESAID BEING AFFILIATES OF THE AMERICAN FEDERATION OF LABOR, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 1737–47) has not yet been reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 65–130) have not yet been reported.

JURISDICTION

The decree of the court below (R. 1748) was entered on March 21, 1938. The petition for a writ of certiorari was filed and served on April 12, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 10, paragraphs (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

As to the question of the Board's jurisdiction over petitioners in No. 916, and as to the procedural questions based upon (1) the claim that the issue of the validity of the contracts involved was not properly before the Board, (2) the absence of a report by the Trial Examiner and of oral argument by petitioners in No. 916, and (3) the refusal of the Board to permit petitioners in No. 916 to call certain witnesses at an adjourned hearing, the questions presented herein are identical with those raised by petitioners in No. 916 (hereinafter called "Consolidated"). The additional questions here presented are:

1. Whether the Act authorizes and empowers the Board to require an employer to cease and desist from giving effect to collective bargaining contracts with a labor organization upon findings that such contracts were entered into as and constituted part of an illegal plan of the employer to force membership in that labor organization to the exclusion of all others, in violation of Section 8 (1) of the Act, and that the contracts so entered into operate as a bar to the freedom of employees in the exercise of their rights to self-organization and collective bargaining as guaranteed in the Act.

2. Whether petitioners herein were denied due process of law by reason of the fact:

(a) That, in the absence of any issue or determination concerning the majority representation of employees, Consolidated was ordered to cease and desist from recognizing petitioners as the exclusive collective bargaining representative of the employees, upon findings that such recognition was accorded as a consequence of coercive conduct by Consolidated in violation of Section 8 (1) of the Act;

(b) That petitioners were not made parties to the proceeding before the Board, which was instituted solely against Consolidated, the employer;

(c) That hearsay testimony was admitted at the hearing.

STATUTE

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Sup. II, Title 29, Sec. 151 *et seq.*) are

set forth in the Board's brief in opposition to the petition for certiorari in No. 916, at pages 33–35.

STATEMENT

The decision of the Board, issued November 10, 1937, setting forth its findings of fact, conclusions of law, and order (R. 65–130), followed upon a hearing held upon a complaint issued by the Board pursuant to a charge duly filed, all as set forth in full in the Board's brief in opposition to the petition for certiorari in No. 916 entitled *Consolidated Edison Company of New York, Inc., et al.* v. *National Labor Relations Board*. Accordingly we respectfully refer the court to the Board's brief in No. 916 for a complete statement of the case (pp. 4–15). It is necessary here only to call the attention of the Court to the fact that a copy of the complaint and notice of hearing was delivered by Western Union Telegraph Messenger Errand Service addressed to petitioner International Brotherhood of Electrical Workers at the office of its Local No. 3 at 130 East 25th Street, New York City.[1] Receipt of the complaint and notice of hearing was acknowledged on the delivery ticket as follows: "Loc. 3, I. B. E. W. D. Kaplan," under date of May 12, 1937 (Bd. Exh. 1, R. 16–18). Thereafter on May 25, 1937, prior to the hearing, a copy of the amended notice of hearing was served upon the International

[1] The delivery ticket was incorrectly addressed to 103 East 25th Street, but delivery was acknowledged at the correct address, 130 East 25th Street.

Brotherhood by registered mail, return receipt requested, at 130 East 25th Street, New York City (Bd. Exh. 1, R. 34–6).[2] In addition, it is undenied by petitioners that, as set forth in the Board's answer to their petition for review in the court below (R. 1715), they had actual notice of the proceedings and that their counsel or other representatives attended the hearings therein. Petitioners at no time, however, participated in the proceedings before the Board, nor did they make application to intervene in those proceedings as they were entitled to do under Section 10 (b) of the Act. After the Board's order was issued, petitioners herein, like petitioners in No. 916, filed in the court below their petition to review and set aside the Board's order under Section 10 (f) of the Act (R. 1554–1691).

ARGUMENT

INTRODUCTION

The question of the Board's jurisdiction over Consolidated, and the procedural questions based upon (1) the claim that the validity of the contracts was not properly before the Board, (2) the absence of

[2] Petitioners attempt to make much of the absence from the record of a registered return receipt covering this service, but carefully avoid denying actual receipt of the amended notice of hearing. An affidavit in the record affirmatively shows that this notice was served in full compliance with the statutory requirements for service upon parties (R. 35–36), even though petitioners were entitled to no more than actual notice (*infra*, pp. 10–12).

a report by the Trial Examiner and of oral argument by Consolidated, and (3) the refusal of the Board to permit Consolidated to call certain witnesses at an adjourned hearing, have been raised by Consolidated in No. 916.[3] To the extent that petitioners herein may be heard upon these questions, the Court is respectfully referred to the Board's brief in No. 916.

In addition, petitioners herein urge (1) that the Board has no authority under the Act to order that effect not be given to contracts executed in violation of the Act; (2) that the Board may not require an employer to cease and desist from recognizing a labor organization as the exclusive representative of his employees for collective bargaining purposes, upon findings that such recognition was accorded in violation of the Act, unless the order is made in a proceeding for or involving the determination of majority representation; (3) that petitioners were

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[3] Consolidated has objected here as in the court below to the fact that the Trial Examiner made no intermediate report and to the absence of oral argument before the Board. As pointed out in the Board's brief in opposition in No. 916 (pp. 30–31), having failed to request oral argument, Consolidated may not claim the denial of a hearing not sought. Since Consolidated has not challenged the sufficiency of the Board's consideration of the evidence or asserted that the findings and order are not those of the Board, the questions before the Court in *Morgan* v. *United States*, 298 U. S. 468, and No. 581, this Term, decided April 25, 1938, are not in issue here. In any event, Consolidated was fully apprised by the Board's complaint of the charges against it and had full opportunity to meet them.

necessary or indispensable parties to the proceeding against Consolidated; and (4) that the admission of hearsay evidence at the hearing vitiates the findings and order of the Board.

All of these claims but the last are disposed of by the decisions of this Court in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, No. 413, decided February 28, 1938, and *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, No. 504, decided February 28, 1938. The last is plainly without merit, both because the Board's findings are based on competent evidence and because the Board is not bound by the strict rules of evidence applicable in judicial proceedings. None of these questions is worthy of review by this Court.

I

PARAGRAPH 1 (F) AND 1 (G) OF THE BOARD'S ORDER, WHICH REQUIRE CONSOLIDATED TO CEASE AND DESIST FROM GIVING EFFECT TO ITS COLLECTIVE BARGAINING CONTRACTS WITH PETITIONERS AND FROM RECOGNIZING PETITIONERS AS THE EXCLUSIVE REPRESENTATIVES OF ITS EMPLOYEES, ARE IN ALL RESPECTS VALID AND PROPER UNDER THE ACT.

The Board found that the contracts between Consolidated and its affiliates and the petitioners were both a part, and the culminating object, of an unlawful campaign by Consolidated to prevent its employees from freely choosing their representatives for purposes of collective bargaining and to force them to join the Brotherhood. Paragraph

1 (f) of the Board's order requires Consolidated to cease and desist from giving effect to these contracts.

Petitioners do not question the findings of fact upon which this paragraph of the order was based, nor did they do so in the court below. Their position is that the Board has no power under the Act or the Constitution to issue orders abrogating contracts, however unlawful such contracts may be. It is a sufficient answer that the Constitution does not protect rights in contracts procured by violation of law; nor can any inference of special regard for such illegal contracts on the part of Congress be drawn so as to overcome the plain language of the statute empowering the Board to order such affirmative relief as will effectuate the policies of the Act.

Apart from the answer under the Constitution and the Act, the decisions of this Court in the *Greyhound* cases indicate that petitioners' contention is without merit. The court there pointed out that the statute left to the Board "some scope for the exercise of judgment and discretion" in choosing the relief to be ordered in a particular case, and that it was for the Board to determine as an inference of fact what relief would most appropriately effectuate the policies of the Act. The fact that such orders might require the termination of existing contractual relationships cannot be regarded as material. Here there can be no question that the Board was warranted in concluding that

continuance of the contracts between Consolidated and petitioners would secure to Consolidated the illegal benefits procured by its past violations of the Act, and would interfere with and impair the right of Consolidated's employees to freedom in self-organization and to collective bargaining through representatives of their own choosing. The order was necessary, the Board found, "to establish conditions for the exercise of an unfettered choice of representatives." (R. 103.)

The *Greyhound* decisions, of course, squarely support paragraph 1 (g) of the order which requires Consolidated to withdraw recognition from petitioners as the exclusive representative of its employees. The objection raised by petitioners herein that the Act authorizes such an order only in a representation dispute and not in a proceeding under Section 8 (1) of the Act was sharply in issue in the *Greyhound* cases, was not accepted by the Court, and is clearly untenable.

It is clearly a matter of no consequence that in the *Greyhound* cases the exertion of pressure by the employer forced the employees into a company union of the employer's choice, whereas here the exertion of such influence through the medium of contracts forced the employees into an independent labor organization of the employer's choice. The continued existence of either type of influence is in plain violation of the command of the statute that the choice shall be that of the employees alone.

II

PETITIONERS WERE NOT DEPRIVED OF DUE PROCESS OF LAW BY ANY FAILURE OF THE BOARD TO GIVE THEM NOTICE OF THE PROCEEDINGS

Petitioners contend that the Board's order is invalid because they were indispensable parties to the proceeding before the Board and because they were not formally served with notice of the hearing (petition, pp. 21–29). The Act requires complaints to be served upon employers, who alone are subject to orders of the Board; it does not permit the Board to make labor organizations parties to its proceedings.* Such organizations, when they are indirectly affected by a proceeding before the Board, are protected under the statute (1) by the provision for intervention before the Board (Section 10 (b)), and (2) by the right to challenge the Board's order in the Circuit Court of Appeals (Section 10 (f)).

Irrespective, however, of these statutory safeguards, the claim that petitioners are indispensable parties is disposed of by this Court's decision in

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*The Act requires, and permits, a complaint to be served only upon persons charged with engaging in unfair labor practices. (Section 10 (b)). Only employers can be found to have engaged in such practices (Section 8), and a labor organization is expressly declared not to be an employer (Section 2 (2)). Accordingly, under the Act only employers are required to be notified or made parties, and it is only upon employers that an order of the Board can impose any enforceable obligation.

National Labor Relations Board v. *Pennsylvania Greyhound Lines, Inc.*, No. 413, decided February 28, 1938, where the same contention was made. The Court there said:

> As the order did not run against the Association it is not entitled to notice and hearing. Its presence was not necessary in order to enable the Board to determine whether respondents had violated the statute or to make an appropriate order against them.

Petitioners attempt to distinguish the *Greyhound* case on the ground that the Association was company dominated, whereas petitioners constitute a *bona fide* independent labor organization. But this Court's decision that the Association was not entitled to notice and hearing did not rest on the nature of the organization, but on the fact, equally applicable to petitioners, that "the order did not run against" the organization in question. The chief differences between this case and the *Greyhound* case are that it appears that the Board here did give the petitioners actual notice of its proceeding, and that petitioners here did protect their rights by obtaining a review of the Board's order in the Circuit Court of Appeals.

The petition itself shows that the Board gave notice of the hearing to petitioners. The claim is that petitioners were deprived of due process because the notice was served on Local Union No. 3 of the International Brotherhood and not on the

main office of the Brotherhood or the locals composed of Consolidated's employees. It is not suggested that this Local did not transmit the notice served on it to the proper officials of petitioners, or that petitioners did not have actual notice of the hearing. Petitioners have not denied the allegation in the Board's answer to their petition for review (R. 1715) that their counsel or other representatives actually attended the hearings. In a proceeding of this kind, where the order does not run against petitioners and when they have a right to intervene if they choose, the Constitution does not require that they be formally served with process. At most they are entitled only to actual notice of the proceeding.

Since petitioners, with knowledge of the Board's proceeding, chose not to intervene before the Board, but rather to obtain review of the order in the Circuit Court of Appeals, they cannot assert that their constitutional rights were infringed. See *American Surety Co.* v. *Baldwin*, 287 U. S. 156; *Commercial Electrical Supply Co.* v. *Curtis*, 288 Fed. 657, certiorari denied, 263 U. S. 709. Nor does due process require a hearing prior to judgment, if defenses—as they were here—may be presented on appeal. *American Surety Co.* v. *Baldwin*, *supra*, and cases therein cited; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 384. *Cf. New Orleans Debenture Co.* v. *Louisiana*, 180 U. S. 320, 330, 332.

III

THE ADMISSION OF HEARSAY EVIDENCE BEFORE THE TRIAL EXAMINER PRESENTS NO REVIEWABLE QUESTION

Petitioners' claim that "illegal" hearsay "was made the basis in great part of the Board's decision and order" (petition, p. 44), sought to be supported by random references to the lengthy record, is contrary to fact. It completely disregards the fact that the Board's findings with respect to the principal issue of coercion are in large part based upon the admissions of Carlisle, the principal executive officer of Consolidated (R. 1202–11, 1217–23, 1234–42), and the testimony of Straub, an officer of the Plans later active in the Brotherhood, whose knowledge was detailed and first-hand (R. 167–298, 804–841).

Aside from the foregoing, the express provision of Section 10 (b) of the Act that "the rules of evidence prevailing in courts of law or equity shall not be controlling" in proceedings before the Board, and the recognized admissibility of hearsay evidence in analogous proceedings, render petitioners' claim void of merit, as the court below held (R. 1743–1744, 1745). *Spiller* v. *Atchison, Topeka & Santa Fe Ry.*, 253 U. S. 117; *National Labor Relations Board* v. *Remington Rand Inc.*, 94 F. (2d) 862 (C. C. A. 2); *John Bene & Sons, Inc.*, v. *Federal Trade Commission*, 299 Fed. 468 (C. C. A. 2d).

CONCLUSION

The judgment below is correct and in accord with the precedents. There is no conflict among the circuits. The petition should be denied.

Respectfully submitted.

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